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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1329

EDWARD H. HYNES, *et al.*,

Appellants,

v.

THE MAYOR AND COUNCIL OF THE BOROUGH OF ORADELL, *et al.*,

Appellees.

On Appeal from the Supreme Court of New Jersey

BRIEF OF THE APPELLEES

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We accept the statements contained on pages 1-9 of the appellants' brief and proceed to the merits.

POINT ONE

The challenged ordinance represents a correct balance between the right of the public generally and the rights of the appellants.

In this enlightened age no legislative body enacts a measure which, baldly, interdicts free speech or censors its content. Measures are adopted within the presumed competence of the legislative body. These measures have a sweep distasteful to some. As a result the enactment is judicially challenged. The challenge is buttressed by copious citations sustaining propositions which no one denies. In the interest of saving judicial time and printer's ink, we make the following concessions, freely. We concede the right of Mr. Hynes to seek any office within the gift of the people; his right to say anything he cares to on his candidacy or any other subject; his right to solicit votes in support of his candidacy. We here interpose a caveat. The gist of this controversy is the requirement that Mr. Hynes and his associates identify themselves if they are to canvass from house to house. We know of no agency that can permit the invasion of private property on the theory that the invader has a message to tell to the nation. The householder is the one who will say whom he invites and whom he repels. The challenged ordinance does not require the obtaining of a permit. If it did, the permit would not be a defense in an action of trespass. The municipality could not deprive the householder of his right of privacy. With this reservation, we would concede Mr. Hynes's right to take his message to the people. We say that right was qualified only by the necessity of identification.

With these preliminary observations, we turn to the ordinance in question. The right of free speech is not an

absolute but a working hypothesis. Numerous decisions of this court assert the right of reasonable regulation. *Breard* v. *Alexander,* 341 U. S. 622 (1951); *Martin* v. *City of Struthers,* 319 U. S. 141; *Cantwell* v. *Connecticut,* 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900 *Konigsberg* v. *State Bar of California,* 366 U. S. 36 (1961). At the state level we refer to *In re Marvin,* 53 N. J. 147 (1969) *cert.* denied 396 U. S. 821, 90 S. Ct. 62, 24 Law Ed. 2d 72 (1969); *Winston* v. *Board of Education of So. Plainfield,* 64 N. J. 582 (1974). In the latter case the State Supreme Court referred to *Pickering* v. *Board of Education,* 391 U. S. 563, 88 S. Ct. 1731, 20 Law Ed. 2d 811. The latter case dealt with the right of the school teacher to express her views. At page 588 the court said:

> "*Pickering* and *Perry* expressly recognize, as do all of the other cited federal decisions, that the teacher's right to speak is not an absolute one but may be limited for the protection of the State's legitimate interests. As the Court put it in *Pickering,* the problem is to arrive at a proper balance between the teacher's interests in speaking freely and the State's interests in promoting the efficiency of its eductional system or other public service."

From abstractions we turn to concrete. The next election in New Jersey is in November. We assume Mr. Hynes to be a candidate for public office, and we assume he wishes to solicit votes in the Borough of Oradell. He may freely do so. The only requirement is that he notify the Police Department, either in writing or orally, what he is about. There is no embarrassing questionnaire to be filled out, no photograph or fingerprints to be submitted and no discretion reposed in any official to grant or withhold permission. If any of the other appellants

desire to obtain signatures on nominating petitions or solicit campaign contributions, they may do so, providing they also notify the Police Department of what they are about.

The question then presented is whether this regulation is a reasonable one. It is hard to see how it could be less onerous without repealing the ordinance altogether. Here too we have an anomaly. This ordinance was enacted by a legislative body, the members of which owe their existence to Mr. Hynes's constituency. Presumably that constituency is satisfied with the ordinance; otherwise, they would have recalled the members of the municipal council. Thus we have Mr. Hynes at war with his own constituency.

This court has placed the public figure in a position different than his fellows. As far as the public figure is concerned state laws regarding defamation are practically non-existent, absent express malice. We refer to *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); *St. Amant* v. *Thompson,* 380 U. S. 727 (1968), *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966); *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1975); *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967); *Gertz* v. *Robert Welch, Inc.,* 94 S. Ct. 3010. See also 79 *Harvard Law Review,* 112-14 (1965); *Hastings Law Journal,* Volume 26, page 780.

One adversely inclined might say this is a strong indication that the right of free speech supersedes the law of defamation but, if this were so, there would be no need to distinguish between public figures and public events. It would be simply enough to say that the law of defamation is inconsistent with the right of free speech and therefore does not exist. If, in the instant case, Mr. Hynes felt he had been defamed by remarks attributed to political opponents, he could not recover damages the

same as a private citizen. He would have the added burden of showing express malice or inexcuseable recklessness. He also could not recover punitive damages.

We thus have the fact that there is a distinct difference between the public figure and the private citizen, and no one suggests that the distinction is odious.

We think the necessity of identification is placed in stark relief when we consider the alternative. As the ordinance states, Oradell is primarily a residential township composed of one-family homes. With its commuting population, the man of the house is away at his employment during the day. As we understand appellants' argument, any person could be free to go from house to house ringing doorbells and observing the conditions that exist. If the police are alerted to this safari and attempt to question the man, he need not answer other than to say he is a candidate for public office or is soliciting support for such a candidacy. The truth of these assertions cannot be questioned. Indeed, if we understand appellants correctly, the questions could not even be asked. If this be the law, there seems little need for police departments and certainly what we call prime crime prevention would be non-existent. In the initial appearance the appellants cited no statistics and gave no information to question the affidavit of the police chief. Those who seek to commit burglary, rape, robbery and other crimes carry no identification marks. They do not bear the trappings of the criminal; they are attired the same as others. Under the ordinance before this court the police would know who was going from house to house. If those who were going from house to house had not identified themselves, the police would know that and could take appropriate measures.

The life blood of the candidate is publicity. He cannot be elected to office unless people know he is running,

and for what. Based on this necessity we have campaign literature distributed through the mail. We have the candidates making speeches over radio and television and purchasing advertising space in the news media. Mr. Hynes could not have been elected to the Assembly unless people knew he was running, and, for them to know he was running, he would have to identify himself and the office he sought. We do not see, therefore, what the appellants have in mind in saying that there might be some secrecy attached to seeking office or soliciting signatures for nominating petitions or campaign contributions. Surely it is not suggested that the householders answering a knock would be told he was to sign a petition without being told who the petition was for or to advance money for an unkonwn and unnamed candidate or cause. The fact of the matter is when the first householder is solicited either for a vote or for a signature or a contribution, the veil of anonymity is lifted.

For the reasons set forth above, we feel the challenged ordinance is immune from any constitutional infringement, whether under the First or the Fourteenth Amendment and the judgment of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

EVERETT I. SMITH
Attorney for the Appellees